No. 95-789

In The

Supreme Court of the United States

October Term, 1995

STATE OF CALIFORNIA, DIVISION OF LABOR STANDARDS ENFORCEMENT, DIVISION OF APPRENTICESHIP STANDARDS, DEPARTMENT OF INDUSTRIAL RELATIONS; COUNTY OF SONOMA,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., INC.; MANUEL J. ARCEO, dba SOUND SYSTEMS MEDIA,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF

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The following is submitted in reply to matters raised in the Brief in Opposition filed by Respondents Dillingham Construction, N.A., Inc. and Manuel J. Arceo, dba Sound Systems Media.

ARGUMENT

(1) Respondents seek in vain to obscure the direct conflict among the circuits on the issue presented by the Petition which is whether a state with a minimum wage law covering workers on public works projects is preempted by ERISA from providing an apprentice-specific wage limited to *bona fide* apprentices. The Ninth Circuit held in this case that California may not limit an apprentice-specific wage to apprentices in registered programs, while the Eighth Circuit upheld just such a limitation in *Minnesota Chapter ABC v. Minnesota*, 47 F.3d 975 (8th Cir. 1995). Respondents, in fact, concede that there is a conflict in the circuits. They seek to minimize that conflict by suggesting that the courts were answering different questions and that the result in California under the Ninth Circuit rule is less draconian since it only invalidates an application of the prevailing wage law and not the entire law. If the approach urged by Respondents were applied to the Minnesota law, however, the entire apprentice exception could be invalidated. This result, plainly in conflict with the policy behind the Fitzgerald Act, argues strongly for Court resolution of this important question. The fact that different circuits may reach different results may sometimes be explained because each circuit is beginning with only the facts of the case before it but the task for this Court is not to explain how each circuit may

have reached the result it did, but rather to harmonize the results so that there is no longer a conflict.

(2) Respondents incorrectly suggest that this case may require the Court to consider factual matters not in the record concerning the state approval process. This is simply not the case. The program in question was given state approval but this contractor sought to pay the apprentice-specific wage during the period before the approval was effective. The standards for approval, which the program did meet, are therefore not in issue. In any case, the Ninth Circuit expressly held that California law is preempted regardless of whether California law contains "independent state standards apart from those set forth in the federal regulations under the Fitzgerald Act." Pet. App. 17. Moreover, the regulation Respondents have submitted as an example of a standard which may exceed the Fitzgerald Act, App. 1-3, only went into effect in October 1995, years after this case was decided in 1991. Finally, the California Supreme Court decision in *Southern California ABC v. California Apprenticeship Council*, 4 Cal. 4th 422, 14 Cal. Rptr. 491 (1992) makes clear that the state may not apply standards for approval which are separate from those in the Fitzgerald Act regulations.

(3) Respondents in their discussion of this Court's decision in *New York State Conference of Blue Cross and Blue Shield Plans et al. v. Travelers*, ___ U.S. ___, 115 S.Ct. 1671 (1995), incorrectly assert that California law directly refers to ERISA apprenticeship plans and is thus "automatically" preempted. In fact, the state law refers to apprentices and apprenticeship programs and these terms are not coextensive with ERISA plans. See Petition 22-23.

Respondents point out that the Ninth Circuit has considered the effects of *Travelers* in two subsequent cases, finding ERISA preemption in each case. *ABC National Line Erection Apprenticeship Training Trust v. Aubry*, 68 F.3d 343 (9th Cir. 1995); *Inland Empire Chapter v. Dear*, 1996 U.S. App. LEXIS 2572 (9th Cir. 1996). These additional Ninth Circuit cases demonstrate that this important conflict in the circuits is not one which will go away. Even after considering the Court's admonitions in *Travelers*, the Ninth Circuit continues to adopt an overly broad view of preemption and an overly narrow view of the scope of the savings clause under ERISA. This erroneous construction leads to results which impair congressional intent as expressed in the Fitzgerald Act.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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